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Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

JAN 25 1999

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Amendment of Section 73.202(b)) MM Docket No. 98-217
Table of Allotments) RM-9382
FM Broadcast Stations)
(Gassaway, West Virginia))

To: John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

COMMENTS

1. Jim Milliken, individually and on behalf of Mid-State Broadcasting Corporation ("Milliken"), objects to the proposed allotment of an FM broadcast channel to Gassaway, West Virginia.

2. Mid-State Broadcasting Corporation is owned by Mr. Milliken, its President, and has been the owner and operator of radio station WSGB(AM), licensed to Sutton, West Virginia, for the past approximately 19 years, since 1980. WSGB(AM) has been in service for 35 years, since 1964. Milliken built WCKA(FM), also licensed to Sutton, in 1987 and has operated the FM station for the past approximately 12 years as well. Mr. Milliken lives in the community in question, Gassaway, and personally directs station operations, as General Manager and Sales Manager. The AM station operates on 1490 kilohertz with power of 1,000 watts day and night. The FM operates on channel 246B1 with power of 25 kilowatts and antenna 193 feet above average terrain.

3. The AM station has employed the call letters "WSGB" since it commenced operation. The letters were selected to reflect the communities of Sutton, Gassaway and Burnsville

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located in Braxton County. Sutton, listed first in the call sign identification, is the Braxton County Seat. Sutton, the licensed location of the stations, and Gassaway, the proposed licensed location of a new FM station, are located approximately five miles apart.

4. Braxton County is a rural area. The population of the entire county is 12,998 according to the 1990 United States Census. This is not an area of growing population. The county population in the 1980 United States Census was 13,894. According to the 1990 census, the three largest communities are Sutton and Gassaway of equal size (939 and 946 people, respectively) and Burnsville (495 people). As County Seat, Sutton is the home of the County Commission, the County Board of Education, the Sheriff, the Court House, and other county offices and facilities. Compare telephone listings for the county and both the cities of Sutton and Gassaway in the "blue pages" of the Sutton telephone directory, copy attached. The Braxton County High School and Braxton County Middle School are located in Flatwoods, West Virginia. There are six Elementary Schools, of which one each is located in Sutton, Gassaway and Burnsville.

5. It is fair to say that, dating back for some thirty years, now, WSGB and WCKA have served as local broadcast outlets for the community of Gassaway no less than for the licensed community, Sutton. For example, Milliken has covered the Gassaway Days Celebration since its beginning over 15 years ago. This is a three to four day event covered with remote broadcasts

and public service announcements. Milliken covers many other events which take place there, such as their Christmas Parade and 4th of July Celebration Parade which coincides with Gassaway Days. The annual Arts & Crafts Show of the Gassaway Women's Club has been covered for over 20 years. This two-day event is covered with remote broadcasts and public service announcements on both stations. During Christmas, Milliken participates in the Christmas From the Heart program, headed by a business located in Gassaway, which provides toys and clothes for needy children in Braxton County. Milliken has also provided publicity for fund raising events for the Davis Elementary School located in Gassaway and Michael Motor Company, its "partner in education."

6. Being a rural area, many of the activities covered by Milliken are based on providing service for all of Braxton County, which is a service to residents of Gassaway no less than to residents of the licensed community, Sutton. Such activities include broadcasts of Braxton County High School football, boys' basketball and girls' basketball. Milliken was the first in West Virginia to cover girls high school basketball on a regular basis, broadcasting games throughout the season. Milliken has also broadcast Braxton County Little League baseball games, which have teams located throughout the county including in Gassaway, and Braxton County High School baseball. Milliken provides coverage of the Braxton County Fairs and Festivals Celebration, a one week event, and Braxton County Homecoming over Labor Day. Milliken conducts tours for the Boys Scouts, Girl Scouts and

other groups; it participates in Career Day Events at both Braxton County High School and Braxton County Middle School.

7. The party that has filed for an FM allocation to Gassaway, "Mountain State Broadcasting," which has chosen not to identify itself or its principals, has misinformed the Commission in a number of respects:

(a) That Braxton County Memorial Hospital is located in Gassaway. Not so. This facility, which serves people throughout the county, is located 2.7 miles from Gassaway and is closer (1.7 miles) to the County Seat, Sutton.

(b) That Pizza Hut is located in Gassaway. Not so. The Pizza Hut is located 2.9 miles from Gassaway and is closer (1.4 miles) to the County Seat.

(c) That Long John Silvers is located in Gassaway. Not so. Long John Silvers is located 2.7 miles from Gassaway and is closer (1.7 miles) to Sutton.

(d) That Jones Chevrolet-Olds, Inc. is located in Gassaway. Not so. The business known locally as Jones Chrevrolet-Oldsmobile-Buick is located at Flatwoods, which is 8.8 miles from Gassaway and is closer (3.6 miles) to the County Seat.

(e) That Revco Drugs is located in Gassaway. Not so. This store, known locally as CVS Pharmacy, is 2.7 miles from Gassaway and is closer (1.7 miles) to Sutton.

(f) That John Radar Buick is located in Gassaway. Not so. This company has not been in business for over two years.

(g) That Gassaway's volunteer fire department serves 3,000

people and 100 square miles, a misleading statement without also stating that virtually every other community in Braxton County also has its own volunteer fire department, supported by a state funding program, including the County Seat, Sutton, whose volunteer fire department is the largest in the county.

8. In this sparsely populated, rural milieu, far removed from cities and radio markets where smaller communities become "lost in the shuffle," Gassaway has been a prominent and integral part of the local listeners, businesses, organizations and citizens who have received radio programming service of direct and specific interest to Gassaway from two locally-owned and operated broadcast stations, "W-Sutton-Gassaway-Burnsville" for 35 years and WCKA(FM) for 12 years.

9. Based on his approximately 19 years experience in the ownership and management of these stations, Mr. Milliken, who has read and approved these comments and has authorized the following statement, is of the opinion that the community of Gassaway does not need and cannot financially support the additional, new FM station proposed in this proceeding.

10. Milliken opposes the allotment of an FM channel to Gassaway:

(a) The premise of the proposed allotment is that Gassaway would receive its first local broadcast outlet for self-expression. That is not the case. Gassaway has two local broadcast outlets for self expression available to it, one dating back 35 years to 1964, the other dating back 12 years to 1987.

The broadcasting services offered by Milliken apply fully and equally to Gassaway as they do to the official community of license, Sutton. The proponents of the proposal have not given a single instance in which Sutton received more favorable broadcast service than Gassaway.

(b) In effect, the proposal is one to allot a third radio station to the communities of Sutton and Gassaway. The aggregation of three radio stations to these two communities, each with only some 900 residents in an county with only 13,000 people and whose population is declining, is a dubious deployment of spectrum under Section 307(b). This is particularly the case in light of Mr. Milliken's experienced opinion that Gassaway cannot support the additional FM station proposed for it.

(c) Sutton and Gassaway are only five miles apart; Mr. Milliken, whose stations are officially licensed to Sutton, lives in nearby Gassaway. A valid analogy may be made to cases wherein a proposed allotment has been denied to a relatively small community located near another community. Amendments of Section 73.202(b), Table of Allotments, FM Broadcast Stations, 2 FCC Rcd. 459 (1987) (Penacock-Concord, New Hampshire), 55 R.R.2d 256 (1983) (Vimville-Meridian, Mississippi); 57 R.R.2d 1275 (1985) (Oak Beach-Bay Shore, New York). In those cases, the community in issue was small in relation to the nearby community with an existing stations or stations, whereas here Sutton and Gassaway are approximately the same size. Nonetheless, the principle of this line of decisions is applicable, i.e., a community having

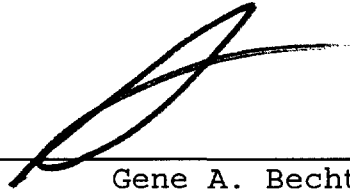
full access to the radio stations licensed to its nearby neighbor should not be considered a community needing its own outlet under Section 307(b).

(d) In reply comments, Milliken's concerns may be countered with the argument that an FCC report and order in 1982 expressed a policy under which, since Gassaway is an incorporated place listed in the United States Census, that conclusively establishes its entitlement to an FM allotment under Section 307(b), irrespective of, and to the exclusion of, any other facts and circumstances. Revision of FM Assignment Policies and Procedures, 51 R.R.2d 807, 816. While these factors may have relevance, the Commission's obligation is to exercise its judgment in Section 307(b) matters and has recognized that a variety of facts and circumstances can be relevant depending on the context. Declaratory Ruling Concerning the Meaning and Effect of Section 73.642(a)(3), 34 R.R.2d 1145 (1975). The 1982 policy statement is 17 years old and Bechtel v. FCC, 10 F.3d 875 (D.C.Cir. 1993) (striking down assumption that a Mom and Pop style of ownership and management was conclusive evidence of projected public interest operation, to the exclusion of evidence of Corporate America style of ownership and management) calls for examination of the agency's underlying assumptions when challenged by the specific facts and circumstances extant here.

(e) The petition for rulemaking has been filed on behalf of something called "Mountain State Broadcasting." At the same approximate time, another petition for rulemaking was filed on

behalf of something called "Mountaineer Communications." See the same public notice soliciting comments on the Gassaway proposal, which also solicited comments on a proposal for Arnoldsburg, West Virginia, MM Docket No. 98-216, RM-9381. Both petitions are signed by the same counsel; no engineering signature is given on the technical exhibit attached to the petitions. This practice should not be accepted. Each of these petitions is a statement of interest in filing an application for the proposed channel, having legal effect under the Commission's rules and policies, i.e., a requirement for an acceptable allotment request, see Appendix to the instant rulemaking notice, and subject to limitations on compensation to be paid for withdrawal, 47 C.F.R. §1.420(j). Each petition contains factual allegations; the instant one is horrendously inaccurate as shown in ¶7. The petitioning parties, whomever they may be, must have been aware that their filings would be of concern to existing known broadcasters, in this case Milliken. Fairness and effective administrative practice in processing such petitions requires that the petitioning parties identify themselves as well, particularly in light of their legally-significant expressions of interest.

Respectfully submitted,

A handwritten signature in black ink, consisting of a large, stylized 'G' followed by a horizontal line extending to the right.

Gene A. Bechtel

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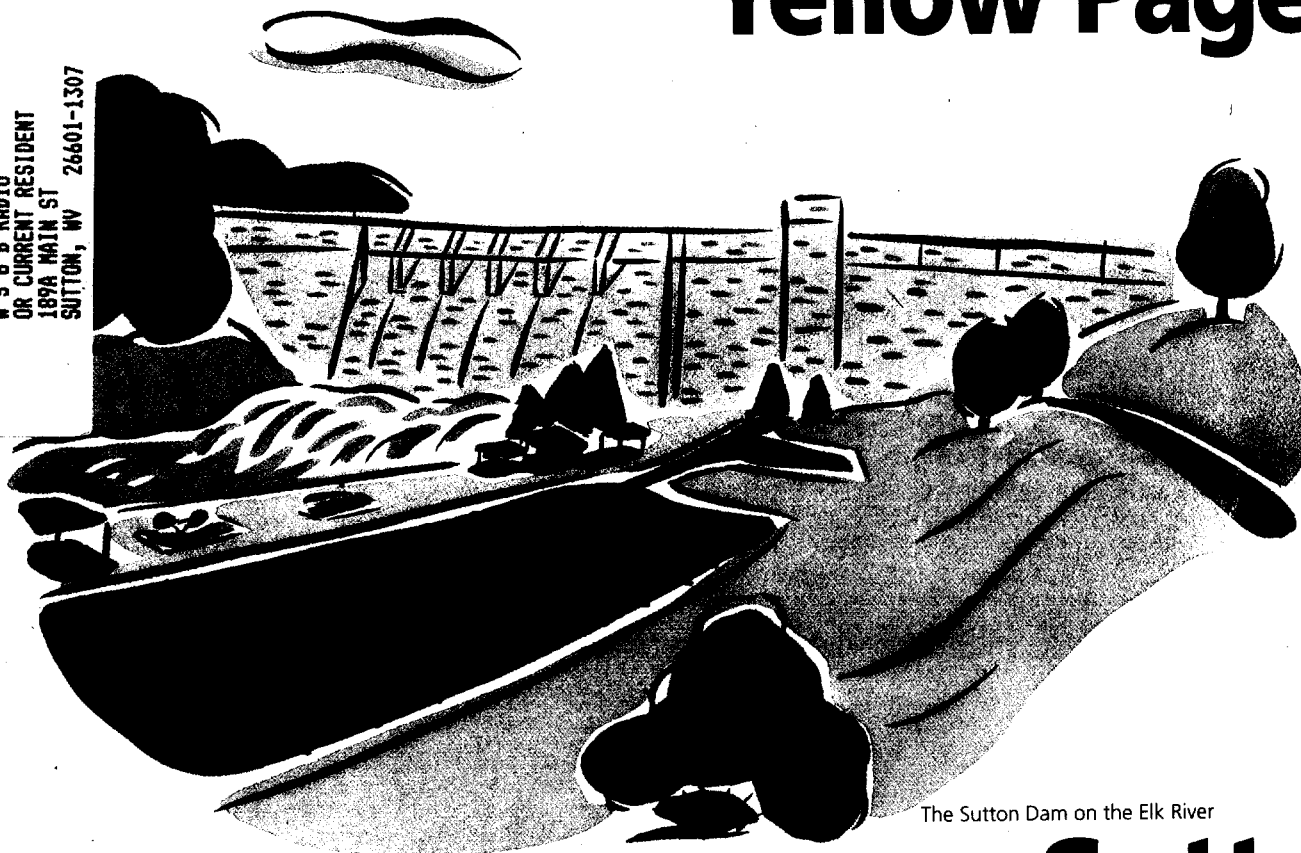
January 25, 1999

Counsel for Jim Milliken

W 5 G B RADIO
OR CURRENT RESIDENT
189A MAIN ST
SUTTON, WV 26601-1307

 **Bell Atlantic**

Yellow Pages



The Sutton Dam on the Elk River

Sutton

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With White Pages for local calling

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Your Yellow Pages On The Internet.
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Area Code 304

April 1998 – March 1999

Includes customer listings of all local telephone companies

RECYCLING INFORMATION
SEE CUSTOMER GUIDE

GOVERNMENT LISTINGS
SEE BLUE PAGES

CERTIFICATE OF SERVICE

I, Stephen M. Rodin, a legal assistant in the law firm of Bechtel & Cole, Chartered, do hereby certify that I have on the 25th day of January, 1999, caused the foregoing "COMMENTS OF JIM MILLIKEN, INDIVIDUALLY AND ON BEHALF OF MID-STATE BROADCASTING CORPORATION" to be mailed by First Class U.S. Mail to the following party:

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Stephen M. Rodin